

Question 5: Professional Responsibility

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered \$15,000 to settle the case without conceding liability. By this time, Lawyer had advanced \$5,000 in litigation and living expenses, and Client had incurred \$5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening, Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

Response Provided By Bar None Review (Lisa Duncanson):

Generally, an attorney owes his client the duty to avoid conflicts and the duties of loyalty, competence, and diligence. Additionally, an attorney has the duty to communicate with the client, to give candid advice, to keep client confidences, to safeguard client funds and property, to avoid charging unreasonable fees and to terminate representation properly. As an officer of the court, an attorney must not commit or aid his client in committing any illegal activity, obstruction of justice or fraud.

Applying these principles, it appears that Lawyer may be subject to discipline for (1) the advance of litigation costs and loan to client, (2) the letter to Doctor assuring payment without Client's consent; (3) the sexual relationship with Client; (4) his conduct in obtaining Client's consent to the settlement with Driver; (5) advising client not to pay Doc; and (6) his potential failure to properly preserve the identity of funds held in trust.

1. Contingency Fee Agreement & Financial Assistance to Client

Under both the ABA Rules and the California Rules of Professional Conduct (hereinafter CRPC) contingency fee agreements must be in writing. Furthermore, a lawyer owes a duty to avoid charging unreasonable fees. The ABA Rules do not allow contingency fee arrangements in family law or criminal cases. However, in California, contingency fee agreements are allowed for family and criminal cases so long as the client is unable to otherwise pay for legal services *and* it is difficult to ascertain the amount of the legal fees for the case. Since this is a suit for personal injuries, a civil matter, a contingency fee arrangement is allowed under both the ABA Model Rules and the CRPC.

Here, Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Since the contingency fee arrangement was in writing and Lawyer's fee is limited to one-third of any recovery (a presumably reasonable fee), the contingency fee agreement appears to be acceptable. However, there is likely a problem with both the advance of litigation costs and living expenses.

A. Advance of Litigation Expenses

The facts state that because Client was indigent, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that Lawyer would recoup from any eventual settlement.

While the facts state the parties entered into a valid written contingency fee agreement, the parties never reduced the agreement that Lawyer would advance litigation costs to writing. While both the Model Rules and the CRPC allow Lawyer to advance litigation costs and expenses for Client, both the ABA Model Rules and the CRPC require Lawyer to put this agreement in writing. Since there was only an oral agreement between Lawyer and Client, Lawyer has violated both the Model Rules and CRPC and will be subject to discipline. In addition, to the extent that the advance of litigation costs is viewed as part of the contingency agreement, it should be in writing.

B. Living Expenses/Loan

Here, Lawyer also orally agreed to lend Client \$1,000 monthly in living expenses. The ABA Model Rules and CRPC differ with respect to lawyers making loans to their clients.

Under the ABA Model Rules, a lawyer is prohibited from providing financial assistance in connection with pending litigation. Here the financial assistance is the living expenses loaned to Client against her recovery in the pending litigation. It is likely that the court would find that Lawyer's loan to Client of \$1,000.00 per month until the recovery is sufficiently connected to the pending litigation with Client. If so, Lawyer will be subject to discipline under the Model Rules.

The CRPC expressly permits Lawyer to loan money to Client provided that Client promises, in writing, to repay the loan. Since the agreement was oral, Lawyer has violated the CRPC and is subject to discipline under these rules as well.

2. Lawyer's Letter to Doctor Assuring full payment

A. Client's Consent

Lawyer's written agreement to pay Doc from the proceeds of the suit, if any, presents a problem because Lawyer did not obtain Client's actual or implied consent. If the scope of the representation was limited, Lawyer may have exceeded his authority to Client's detriment in the amount of \$5,000. In addition, the client must make any decisions that affect client's substantial rights and decisions, such as to whether to accept a settlement offer. The lawyer is limited to deciding questions of strategy, procedure or trial tactics.

CRPC: The problem for Lawyer, under the California Rules, is that Rule 4-210 prohibited Lawyer from agreeing to pay or representing that Client would pay any expense to Doctor from funds to be collected as a result of the representation without Client's consent.

Here, Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

It was improper for Lawyer to do this. Furthermore, Lawyer's letter affected the client's substantial rights. The recovery in the case belongs to the client, and only the client is allowed to decide how it is spent. Since, the letter to Physician was written without the client's consent Lawyer breached his ethical duties by assuring Physician that he would receive full payment out of the recovery in the case.

ABA Model Rules: Model Rules 1.2 and 1.4 required Lawyer to communicate with the Client concerning the goals of the representation so as to know what actions were impliedly or expressly authorized in furtherance of Client's legitimate goals. Here, the facts are ambiguous as to whether Client only wanted representation in litigation against Driver for the accident or whether the scope of representation included circumstances related to the accident, such as the Doctor's bill for medical treatment. However, in this case the facts state that Client did not know of Lawyers representation to Doctor that the medical expenses would be paid out of any recovery. Therefore, unless Lawyer can show that somehow Client knew that the medical treatment she received would be paid for out of the settlement or recovery, Lawyer has likely violated the Model Rules as well.

Breach of duty to communicate

In addition, Lawyer has also breached the duty to communicate with his client by failing to inform Client of the arrangement with Doctor.

3. Dating Client/Sexual Relationship with Client

The CRPC and the ABA Model Rules differ with respect to sexual relationships with clients.

A. California Rules

The CRPC prohibits Lawyer from using "undue influence" with Client in entering a sexual relationship. Although the facts show that Client "consented," if Client was under the influence of alcohol, the State Bar may find that Lawyer exercised "undue influence" in beginning his sexual relationship with Client. The Bar will probably consider the alcohol consumed, but also financial factors such as the indebtedness of

Client (due to the loans made to Client), the expensive dinner and that Lawyer took Client to his apartment. These financial factors are relevant to the issue of coercion and undue influence because Client's status as an indigent who is arguably dependent upon Lawyer for financial support may make it more likely that she will submit to Lawyer's advances. For all of these reasons, Lawyer may be subject to discipline under California law.

If, however, Client was not impaired by her consumption of wine, and there was no use of undue influence or coercion, Lawyer will not be subject to discipline under California law, unless the sexual relationship prevented Lawyer from representing Client competently. Although the facts state the Driver had a strong defense, and it is unlikely Client would have a substantial recovery, a strong argument can be made that Lawyer was thinking of himself and not his client. To date Lawyer had already advanced \$5,000 in litigation and living expenses. Therefore, by putting his own interests ahead of Client, Lawyer was not acting competently. If it is found that Lawyer's decision to advise Client to settle was not competent legal advice then lawyer is subject to discipline under the CRPC.

B. Model Rules:

Model Rule 1.8 prohibits an attorney from having "sexual relations" with a client unless a consensual sexual relationship existed prior to the representation. Here, there are no facts showing that Lawyer had any consensual sex with Client until well into the present representation. Thus, in jurisdictions applying the Model Rules, Lawyer is subject to discipline under Model Rule 1.8.

4. Persuading Client to accept settlement offer / Conflict of Interest

Lawyer's conduct in relation to obtaining Client's consent to settle with Driver potentially violated the basic foundation of the legal representation—the Duty of Loyalty. The evening of fine dining, wine, and sexual relations with his indigent client were arguably initiated only because Lawyer realized that the litigation would drag on, without much chance of more success. Because the agreement was a contingency agreement, this state of affairs was to Lawyer's detriment and Lawyer now appears to want to deprive Client of the benefit of the bargain. Thus, Lawyer apparently embarked on a scheme to convince Client to consent to a settlement that seems to have left her with little compensation.

On the other hand, Client actually obtained a net benefit in that she received approximately \$5,000 (which was used to pay her personal living expenses) and an additional \$5,000. In addition, the ABA Model Rules prohibit Lawyer from abusing the legal process by maintaining an action against Driver if Driver does not have liability and if there is no good faith argument for an extension, modification or reversal of existing law. Since the facts are silent as to the nature of Driver's asserted defense, the question is a close one.

Although the call is close, the fact that Lawyer employed illegitimate means to procure Client's consent to the settlement would not be mitigated by the lack of harm to Client which might arise if the action against Driver is frivolous. Thus, Lawyer should be subject to discipline under both the Model Rules and California law.

5. Advising Client not to pay Doctor

By agreeing to not pay Physician anything, Lawyer has opened up his client to another lawsuit. Lawyer knows that Physician is expecting to be paid out of the recovery in the case and when that does not happen it is foreseeable that Physician will initiate an action to recover from Client. By not warning Client of this possibility, Lawyer was not zealously representing his client when he advised Client to accept the settlement offer. Lawyer had violated his duty of loyalty and his duty of competence by not advising Client of the letter to Physician.

6. Identity of Client Funds

ABA Model Rule 1.15(e) required Lawyer to segregate funds arguably owed to Doctor since Lawyer knew of Doctor's claim and promised to pay Doctor, even if Client denies the validity of Doctor's claim until the interests are satisfactorily determined.

Conclusion

For all of the above reasons, Lawyer committed numerous ethical violations exposing him to the risk of discipline by the State Bar.

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